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Nos. 14-840, 14-841

In The
Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL.*,
Respondents.

ENERNOC, INC., *ET AL.*,
Petitioners,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF THE GUARINI CENTER ON ENVIRONMENTAL, ENERGY AND LAND USE LAW AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This *amicus* brief considers the first of the Questions Presented:

> Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates.

TABLE OF CONTENTS

Page

Interest of the *Amicus Curiae* 1

Summary of the Argument 2

Argument 3

I. Demand Response Resources Play a Vital Role in Improving the Performance of the Wholesale Markets 3

A. Wholesale demand response programs confer four important resource efficiency benefits to the electricity system 5

B. Wholesale demand response programs also can confer important environmental benefits 8

C. The benefits of wholesale demand response programs cannot be replicated by state initiatives 10

1. Dynamic pricing programs are still nascent 10

2. State level demand response programs pose significant coordination problems that prevent them from providing adequate demand response 11

II. Order 745 is a Logical and Incremental Extension of FERC's Prior Steps to Deploy Demand Response Resources in Wholesale Markets 13

TABLE OF CONTENTS – Continued

Page

A. RTOs and ISOs took early steps to develop demand response programs to improve the efficient operation of the wholesale markets 14

B. The Western Energy Crisis prompted FERC initiatives to encourage wholesale demand response 15

C. FERC took further steps to expand demand response programs after Congress endorsed such programs 16

D. Order 719 required RTOs and ISOs to incorporate demand response in certain markets and was not judicially challenged 17

E. Order 745 is a natural outgrowth of FERC's prior decisions 18

III. In its Efforts to Remove Barriers to Demand Response Participation in Wholesale Markets, FERC Has Consistently Respected State Authority 19

A. States remain free to design and implement state level demand response programs 19

B. FERC's orders on demand response have consistently empowered States to prohibit retail demand response resources from participating in wholesale markets if they wish 20

TABLE OF CONTENTS – Continued

Page

C. States did not seek judicial review of Order 745 on jurisdictional grounds 22

IV. EPSA's Attack on FERC's Jurisdiction in This Case is Flatly Inconsistent with the Position it Previously Asserted to FERC in Administrative Proceedings 25

Conclusion 26

TABLE OF AUTHORITIES

Page

CASES

Electr. Power Supply Ass'n v. FERC, 753 F.3d 216 (D.C. Cir. 2014) 19

Ind. Util. Regul. Comm'n v. FERC, 668 F.3d 735 (D.C. Cir. 2012) 17

FEDERAL AND STATE STATUTES

Ark. Code Ann. § 23-18-1004 (2014) 21

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§ 529, 121 Stat. 1664-65 (42 U.S.C. § 8279) 16

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICUS CURIAE*[1]

The Frank J. Guarini Center on Environmental, Energy, and Land Use Law at New York University School of Law[2] is dedicated to addressing environmental and energy challenges using market-oriented strategies. The Guarini Center is a collaborative effort of faculty at New York University School of Law, a full-time staff, fellows and law student research assistants. The Center's faculty, Professors Richard B. Stewart and Katrina M. Wyman, have produced extensive scholarship on administrative, regulatory and environmental law. The Faculty Director of the Center, Professor Richard B. Stewart, himself has published more than 100 articles on these subjects.

Recently, the Guarini Center has focused on innovative approaches to regulating the electricity system. The Center has undertaken research, released publications, and hosted events on new strategies for regulating the electricity sector in the U.S. and abroad. A particular area of interest has been New York State's ongoing efforts to leverage

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[1] Counsel for all parties received notice, of *amicus*' intent to file this brief and have consented to its filing. No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or New York University, if any.

technological advances to enlist more customer participation in the electricity system, and animate markets for customer-side resources including demand response. As New York State's efforts demonstrate, technological advances are driving significant change throughout the electricity system. The Court of Appeals' restrictive definition of FERC's jurisdiction would impede FERC's ability to respond to these changes to protect the integrity and efficiency of the wholesale markets that it oversees.

SUMMARY OF THE ARGUMENT

In order to secure the Nation's goal of efficiently providing cost-effective electricity to consumers, the Court should reverse the Court of Appeals' jurisdictional ruling and thereby preserve the authority of the Federal Energy Regulatory Commission (FERC) over wholesale demand response programs. Wholesale demand response programs play a critical role in promoting the efficiency of the organized wholesale electricity markets that FERC regulates by enabling market operators to meet electricity needs through the lowest cost means available.

Recognizing the significant contributions of demand response programs in enhancing the efficiency of wholesale markets and lowering electricity prices, FERC has worked incrementally for over a decade to integrate such programs into the markets, most recently by promulgating Order 745. In so doing, FERC

has consistently respected state authority over retail sales; Order 745 is no exception. The States themselves have not judicially challenged Order 745 on jurisdictional grounds. The present claim of the Electric Power Supply Association (EPSA) that FERC lacks jurisdiction over wholesale demand response resources is flatly inconsistent with a position that it has previously expressed to FERC.

The D.C. Circuit decision vacating Order 745 on jurisdictional grounds casts serious doubt on whether demand response programs will be able to continue to participate in the wholesale markets in any way, which would deprive the electricity system and electricity consumers of important benefits. The Court of Appeals' jurisdictional ruling should accordingly be reversed.

This brief takes no position on the merits of the formula set forth in Order 745 for compensating demand response in the wholesale energy markets.

ARGUMENT

I. Demand Response Resources Play a Vital Role in Improving the Performance of the Wholesale Markets

The organized wholesale electricity markets, which are managed by FERC-regulated entities known as Independent System Operators (ISOs) or Regional

Transmission Organizations (RTOs), supply power to tens of millions of American consumers.[3] These ISOs and RTOs manage transmission facilities and administer markets through which sales of bulk power – that is, sales of electric power for resale – are arranged. What is at stake in this case is whether the ISOs and RTOs can continue to include demand response resources as part of their efforts to efficiently manage the wholesale markets.

Affirming the D.C. Circuit decision vacating Order 745 could deprive the wholesale markets of the important benefits that demand response resources provide. If FERC does not have jurisdiction to regulate the terms by which demand response resources participate in the wholesale markets that it regulates, it may not be possible for such resources to participate in these markets at all. *See* Pet'r's Br. 31. In fact, some industry players have already interpreted the decision as having precisely this effect. *See, e.g., New Eng. Power Generators Ass'n, Inc. v. ISO New Eng., Inc.*, FERC Docket No. EL15-21-000, at 1 (Nov. 14, 2014); *FirstEnergy Serv. Co. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL14-55-000, at 1 (May 23, 2014). Such a result would undermine the Nation's goal of providing cost-effective electricity to consumers while also protecting the environment.

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[3] *See* FERC, *Regional Transmission Organizations (RTO)/ Independent System Operators (ISO)*, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last visited July 13, 2015).

A. Wholesale demand response programs confer four important resource efficiency benefits to the electricity system

Wholesale demand response programs create a more efficient allocation of resources by allowing wholesale market operators to choose the lowest cost resource to maintain the balance between supply and demand – by increasing the supply of electricity from power plants or reducing the demand for electricity from consumers. *See, e.g.*, Paul Centolella, *The Integration of Price Responsive Demand into Regional Transmission Organization (RTO) Wholesale Power Markets and System Operations*, 35 Energy 1568, 1569-1570 (2010). In so doing, these programs improve the efficiency of the wholesale electricity markets in at least four ways: 1) they reduce average prices, 2) they limit price spikes, 3) they enhance competition and mitigate market power, and 4) they fortify reliability. Each of these benefits ultimately accrues to consumers.

1) *Reducing average prices* – By limiting peaks in demand for electricity, wholesale demand response programs reduce the need to bring online the most costly power plants and to build new power plants and transmission facilities to meet peak levels of demand. Both of these effects can help reduce the average cost of electricity over the long run. For this reason, demand response programs lower average electricity prices. Mohammed H.

Albadi & Ehab F. El-Saadany, *A Summary of Demand Response in Electricity Markets*, 78 Electric Power Sys. Res. 1989, 1991 (2008).

2) *Limiting price spikes* – By helping to flatten demand for power in wholesale markets, demand response can reduce the frequency and degree of price spikes during periods of high system demand. *See generally* Severin Borenstein et al., *Dynamic Pricing, Advanced Metering and Demand Response in Electricity Markets*, CSEM WP 105, at 11 (2002) (working paper). For instance, it has been estimated that a 2.5 percent reduction in demand during the peak of California's electricity crisis in 2000-2001 could have reduced wholesale electricity prices by approximately 25 percent. Steven Braithwait & Ahmad Faruqui, *The Choice Not to Buy: Energy Savings and Policy Alternatives for Demand Response*, 139 Pub. Util. Fort. 48, 54 (Mar. 15, 2001).

3) *Enhancing competition and mitigating market power* – Wholesale demand response programs help promote competition and mitigate the market power of electricity generators in the wholesale markets by introducing an alternative resource that can be used to keep the grid in balance. When power supply in energy markets is tight, power producers may withhold a portion of their capacity so as to create artificial shortages that

drastically drive up the spot price. Severin Borenstein, *The Trouble with Electricity Markets: Understanding California's Restructuring Disaster*, 16 J. Econ. Persp. 191, 196 (2002). Wholesale demand response programs can neutralize power producers' attempts to manipulate markets in this way by enabling grid operators to call up demand resources to compensate for shortages in supply. Stephen J. Rassenti et al., *Controlling Market Power and Price Spikes in Electricity Networks: Demand-Side Bidding*, 100 PNAS 2998, 3003 (2003). In addition, demand response resources exert "downward pressure on generator bidding strategies by increasing the risk to a supplier that it will not be dispatched if it bids a price that is too high." U.S. Dep't of Energy, Benefits of Demand Response in Electricity Markets and Recommendations for Achieving Them: A Report to the U.S. Congress Pursuant to Section 1252 of the Energy Policy Act of 2005 vi, 29 (2006).

4) *Fortifying reliability* – Wholesale demand response programs promote the reliability of electricity service by enabling ISOs and RTOs to reduce demand when service interruptions are imminent. Several state electricity regulators have credited wholesale demand response programs with helping to maintain the supply of electricity during heat waves and extreme cold weather. Letter from Sarah

Hofmann, Exec. Dir., New Eng. Conf. of Pub. Util. Comm'rs, to Cheryl A. LaFleur, FERC Acting Chairman, FERC Docket No. RM10-17-000 (July 1, 2014) (describing reliability benefits of wholesale demand response in New England). *See also* Letter from Audrey Zibelman, Chair, N.Y. Pub. Serv. Comm'n, to Cheryl A. LaFleur, FERC Acting Chairman, FERC Docket No. RM10-17-000 (July 3, 2014).

B. Wholesale demand response programs also can confer important environmental benefits

In addition to the four market efficiency benefits described above, wholesale demand response programs can confer environmental benefits.[4] In the short term, the ability of wholesale demand response programs to suppress price spikes, described above, reduces the system's reliance on its oldest, least efficient, and most expensive power plants. Accordingly, in regions with relatively clean baseload power systems, shifting consumption away from high demand periods may reduce emissions of carbon dioxide

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[4] Customers reducing electricity consumption from the grid under demand response programs may resort to generating electricity on site from polluting diesel generators. However, this problem can be addressed through environmental regulation. *See* Doug Hurley et al., Regul. Assistance Proj., *Demand Response as a Power System Resource* 14 n.5 (2013).

and local air pollutants such as nitrous oxides and sulfur dioxide. Hurley et al., *supra*, at 14 (2013). *See also* Kyle Siler-Evans et al., *Marginal Emissions Factors for the U.S. Electricity System*, 46 Environ. Sci. Tech. 4742, 4746 (2012).

Over the long term, the participation of demand response resources in wholesale markets can facilitate the incorporation of greater quantities of renewable energy in the electricity system. Because renewable generation technologies, such as solar and wind power, produce quantities of electricity that vary depending on sunshine and wind, it is critical that other system resources be available at short notice to retain the balance between supply and demand when the sun is blocked or the wind stops blowing. By allowing market operators to reduce demand when needed, demand response can facilitate high levels of intermittent generation, as it has in countries with high levels of renewable sources like Denmark. *See, e.g.*, Benjamin Biegel et al., *Value of Flexible Consumption in the Electricity Markets*, 66 Energy 354, 355 (Mar. 2014). *See also* James Newcomb et al., *Distributed Energy Resources: Policy Implications of Decentralization*, 26 Electr. J. 65, 65 & n.2 (Oct. 2013) (stating that flexible resources like demand response are especially important with high penetrations of variable renewable generation).

C. The benefits of wholesale demand response programs cannot be replicated by state initiatives

1. Dynamic pricing programs are still nascent

A theoretical alternative to wholesale demand response programs is to vary the price retail consumers are charged to reflect the fluctuating cost of producing electricity, known as dynamic pricing. However, there are political obstacles to implementing retail dynamic pricing – for example, very high prices during peak demand periods threaten public backlash – and it has not been widely adopted by state regulators. Borenstein et al., *supra*, at 20. In fact, under four percent of U.S. electric utility customers were subscribed to a dynamic pricing program in 2013. U.S. Energy Info. Admin., *Annual Electric Power Industry Report*, Form EIA-861 (June 2015). In the absence of dynamic pricing, economists widely agree that there is a need to incorporate demand response programs into the wholesale markets in order to better link wholesale and retail markets and thereby improve their performance. *See, e.g.*, Ahmad Faruqui et al., *Fostering Economic Demand Response in the Midwest ISO*, 35 Energy 1544, 1545 (2010); Richard N. Boisvert & Bernard F. Neenan, *Social Welfare Implications of Demand Response Programs*

in Competitive Electricity Markets, LBNL-52530, at ES-II (2003).[5] FERC has embraced this position.

2. State level demand response programs pose significant coordination problems that prevent them from providing adequate demand response

EPSA has suggested that the D.C. Circuit decision does not have serious ramifications for the electricity system because the "States remain free to develop and regulate their own demand response programs." Br. in Opp. 3. Under state level programs, the customer commitments that utilities and/or aggregators obtain to reduce consumption are not sold into the wholesale markets, and the programs are entirely under the jurisdiction of state electricity regulators.[6] If wholesale demand response programs

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[5] Moreover, even if dynamic pricing were widely adopted, wholesale demand response programs may still confer distinct reliability benefits to wholesale market operators. Unlike dynamic pricing programs, which encourage, but do not require, customers to reduce their electricity usage, demand response programs elicit advanced commitments to reduce consumption. As such, they provide system operators greater certainty that resources will be available at critical moments. Borenstein et al., *supra*, at 18-19.

[6] For example, Consolidated Edison of New York (ConEd), a distribution utility, has long had demand response programs entirely regulated by the New York State Public Service Commission under which the utility pays customers to reduce their demand at peak times, to help maintain system reliability. *Order Adopting Dynamic Load Management Filing*, N.Y. Pub.

(Continued on following page)

were eliminated, however, state level demand response programs could not fully replicate the benefits that wholesale programs provide.

Balkanizing the market for demand response resources along state lines would lead to suboptimal provision of such resources. In multi-state ISOs or RTOs, demand reductions within one State can benefit other States by reducing wholesale prices across the ISO/RTO footprint. If left to determine on their own how much to reduce electricity demand, each State will reduce only by the amount that is cost-beneficial for it. A State will not consider the benefits that other States enjoy from its demand reductions, because the State will receive no compensation for reducing electricity prices in other States and will have to bear the full costs of the demand reductions that it undertakes. The combination of diffuse benefits and concentrated costs creates free-riding concerns that would disincentive investment in demand response. *Cf.* William W. Hogan, *Transmission Benefits and Cost Allocation* 3 (May 31, 2011) (discussing

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Serv. Comm'n, Case No. 14-E-0423 (June 18, 2015). These programs currently are state level only demand response programs because ConEd does not sell its customers' commitments to reduce power in the wholesale energy markets that are administered by the New York Independent System Operator (NYISO). The NYISO compensates customers for contributing to maintaining bulk power system reliability separately. N.Y. Indep. Sys. Op., *Demand Response Programs*, http://www.nyiso.com/public/markets_operations/market_data/demand_response/index.jsp (last visited July 13, 2015).

free-rider problems associated with the benefits and costs of investment in electric transmission infrastructure). *See also* Br. for PJM Interconnection, L.L.C. in Support of Petitioners 31-32.

To overcome such disincentives, and achieve demand reductions that mimic those provided through wholesale demand response programs, the States would need to devise a coordination mechanism to determine both who should reduce consumption at a given time and how to allocate the costs of these reductions. Coordinating in this manner could be exceedingly difficult from a practical standpoint, especially in multi-state ISOs and RTOs, such as PJM, which spans thirteen States and the District of Columbia.

II. Order 745 is a Logical and Incremental Extension of FERC's Prior Steps to Deploy Demand Response Resources in Wholesale Markets

Over the past fifteen years, as awareness of the value of demand response resources has grown, FERC has moved step by step to increase the contribution of these resources to the wholesale markets. Order 745 is an incremental and logical outgrowth of these earlier efforts. The Court of Appeals' decision could have the sweeping effect of undoing over a decade of FERC initiatives to remove barriers to the participation of demand response resources in the wholesale markets.

A. RTOs and ISOs took early steps to develop demand response programs to improve the efficient operation of the wholesale markets

After the organized wholesale markets were established in the late 1990s, FERC initially focused on the design of the markets and the rules governing access to transmission and the dispatch of supply from power plants. Hurley et al., *supra*, at 19-21; Jon Wellinghoff & David L. Morenoff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 Energy L.J. 389, 391 (2007). In the late 1990s and early 2000s, several ISOs and RTOs recognized that demand response programs could improve the efficiency of wholesale markets, and with FERC's approval and encouragement, adopted such programs. PJM, the New York ISO, and the New England ISO were among the earliest wholesale market operators to implement such programs. Rahul Walawalkar et al., *Evolution and Current Status of Demand Response in Electricity Markets: Insights from PJM and NYISO*, 35 Energy 1553, 1554 (2010); Romkaew Broehm & Peter Fox-Penner, *Price-Responsive Electric Demand: A National Necessity, Not an Option*, *in* Electricity Pricing in Transition 160-161 (Ahmad Faruqui & Kelly Eakin eds., 2002).

B. The Western Energy Crisis prompted FERC initiatives to encourage wholesale demand response

In response to the Western Energy Crisis of 2000-2001, FERC itself initiated measures to promote demand response participation in the wholesale markets. When wholesale electricity prices in California skyrocketed and there were blackouts, FERC issued a series of decisions to address the crisis. In one decision, FERC allowed customers to sell demand reductions in wholesale electricity transactions. *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 66 Fed. Reg. 15,858, 15,859, 15,861-62 (Mar. 21, 2001). However, in allowing these transactions, FERC was careful to include a restriction in favor of state regulatory authority: retail customers were only allowed to sell such reductions, "as permitted by state laws and regulations." *Id.* As described in Section III.B below, this limitation, which respects state jurisdiction over retail sales, has been maintained in later FERC rulemakings on demand response.

Following the Western Energy Crisis, and electricity price increases in other regions, policy makers recognized with new urgency the role that demand response can play in ensuring reliable, lower-cost electricity service. During this time period, FERC approved additional ISO and RTO proposals to incorporate demand response into the wholesale markets. *PJM Interconnection, L.L.C.*, Order Accepting Tariff Sheets as Modified, 99 F.E.R.C. ¶ 61,139 (2002); *PJM*

Interconnection, L.L.C., Order Accepting Tariff Sheets as Modified, 99 F.E.R.C. ¶ 61,227 (2002).

C. FERC took further steps to expand demand response programs after Congress endorsed such programs

In the Energy Policy Act of 2005, Congress declared: "It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, and unnecessary barriers to demand response shall be eliminated." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 966 (16 U.S.C. § 2642). Subsequently, in the Energy Independence and Security Act of 2007, Congress required FERC to prepare several reports on demand response. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 529, 121 Stat. 1492, 1664-65 (42 U.S.C. § 8279). That same year, FERC, referring to Congressional support for demand response, authorized demand response to provide ancillary services, and required that transmission planning consider demand response comparably to generation resources. *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12,266, 12,326, 12,378-79 (Feb. 16, 2007) (citing Energy Policy Act of 2005 § 1252(f)).

D. Order 719 required RTOs and ISOs to incorporate demand response in certain markets and was not judicially challenged

In 2008, FERC issued Order 719, which went beyond facilitating the participation of demand response resources in wholesale electricity markets to require that ISOs and RTOs allow such participation, provided certain conditions apply. For present purposes, the most notable aspect of the Order was a requirement that ISOs and RTOs permit, in certain circumstances, aggregators to bid demand response on behalf of retail customers directly into organized wholesale energy markets. *Wholesale Competition in Regions with Organized Electric Markets*, 73 Fed. Reg. 64,100, 64,103 (Oct. 28, 2008); 74 Fed. Reg. 37,776, 37,777 (July 29, 2009). FERC found that "[a]ggregating small retail customers into larger pools of resources expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability." 73 Fed. Reg. at 64,119. No one – neither the States nor industry – petitioned for judicial review on the basis that Order 719 exceeded the scope of FERC's jurisdiction, or challenged Order 719 in court on any ground.[7]

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[7] The Indiana Utility Regulatory Commission unsuccessfully challenged FERC's approval of the tariff through which PJM Interconnection implemented Order 719 in the D.C. Circuit. *Ind. Util. Regul. Comm'n v. FERC*, 668 F.3d 735 (D.C. Cir. 2012). Indiana did not challenge Order 719 itself in this case.

E. Order 745 is a natural outgrowth of FERC's prior decisions

FERC launched the rulemaking that culminated in Order 745 in 2010, after finding that "demand response providers" still continued to "play a small role in wholesale markets," despite the agency's prior efforts. *Demand Response Compensation in Organized Wholesale Energy Markets*, 75 Fed. Reg. 15,362, 15,365 (proposed Mar. 29, 2010). FERC was concerned that "the existing and varying levels of compensation" across the ISOs and RTOs "generally fail to reflect the marginal value of demand response resources to ISO and RTO energy markets." *Id.* To remedy this problem, Order 745 established a uniform approach for compensating demand response resources in the wholesale energy markets in order to send an appropriately robust price signal of the value of such resources. *Demand Response Compensation in Organized Wholesale Energy Markets*, 76 Fed. Reg. 16,658, 16,668-69 (Mar. 24, 2011).

Order 745 is a logical outgrowth of prior FERC initiatives to enhance demand response participation in wholesale markets. FERC has long reviewed the compensation formulas used by ISOs and RTOs to pay for demand response resources as part of its duty to review ISO and RTO tariffs. *See, e.g., PJM Interconnection, L.L.C.*, Order Accepting and Suspending Filing, 92 F.E.R.C. ¶ 61,059 (2000) (order approving 2000 pilot PJM program). What FERC did in Order 745 was simply to prescribe a uniform formula for compensating demand response as part of the

agency's step-by-step efforts to enhance the role of demand response in the wholesale markets. 75 Fed. Reg. at 15,364-65 (noting that the Commission has "previously allowed a system-by-system approach whereby each RTO and ISO has developed its own compensation formula for demand response.").

III. In its Efforts to Remove Barriers to Demand Response Participation in Wholesale Markets, FERC Has Consistently Respected State Authority

In taking steps to include demand response resources in the wholesale markets, FERC has consistently respected state authority over state level demand response programs. This is not an instance of an agency overreaching and intruding on state jurisdiction. *See Electr. Power Supply Ass'n v. FERC*, 753 F.3d 216, 233 (D.C. Cir. 2014) (Edwards, J., dissenting) ("This is hardly the stuff of grand agency overreach.").

A. States remain free to design and implement state level demand response programs

States remain completely free to establish and regulate state level demand response programs, unfettered by FERC oversight. *Demand Response Compensation in Organized Wholesale Energy Markets*, 137 F.E.R.C. ¶ 61,215, 62,302 (2011). This means that the States can require utilities under their jurisdiction to provide customers with payments to

reduce demand and can regulate the terms under which such payments are made. States are, in fact, mandating that utilities establish such programs. *See, e.g.*, *Motion of the Commission to Develop Dynamic Load Management Programs*, N.Y. Pub. Serv. Comm'n, Case No. 14-E-0423, at 9 (Dec. 15, 2014) (requiring all electric distribution utilities in the State that did not already have demand response programs to establish such programs).

B. FERC's orders on demand response have consistently empowered States to prohibit retail demand response resources from participating in wholesale markets if they wish

FERC has acted consistently to ensure that States can keep retail customers' demand response out of the wholesale markets – and therefore outside of the federal regulatory ambit – if they so choose.

As discussed above, during the Western Energy Crisis, FERC allowed retail customers to sell demand reductions in wholesale transactions only "as permitted by state laws and regulations." 66 Fed. Reg. at 15,859, 15,861-62. Similarly, Order 719 prohibited wholesale market operators from accepting bids into the energy markets from aggregators operating in territories in which the "laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate." 18 C.F.R. 35.28(g)(1)(iii). Order 745 does nothing to diminish

state autonomy to limit demand response participation in the wholesale markets. *Id.* It merely addresses the formula that will be used to compensate those resources that States permit to participate in the wholesale markets.

The right to restrict demand response resources from participating in wholesale markets is not merely theoretical. Numerous States have exercised this right, including Arkansas, Indiana, Michigan, Missouri, and North Carolina.[8]

By permitting States to prohibit demand response resources from participating in the wholesale markets, FERC's rulemakings on demand response provide the States with the option of enabling demand response resources to participate in these markets but do not require them to do so. As such, FERC's efforts to boost demand response in wholesale markets offer the States an additional regulatory tool that they can

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[8] Ark. Code Ann. § 23-18-1004 (2014); *AK Steel Corp.*, Petition for Approval of Extension of the Term to Participate in PJM Load Response Programs, Ind. Util. Regul. Comm'n Cause No. 43566, at 5-6 (Feb. 25, 2009); *Detroit Edison Co.*, Request to Initiate Investigation of Licensing Rules, and Regulations Needed to Address the Effect of the Participation of Retail Customers, Mich. Pub. Serv. Comm'n No. U-16020, at 4-5 (Dec. 2, 2010); *In re Order Temporarily Prohibiting the Operation of Aggregators of Retail Customers*, Mo. Pub. Serv. Comm'n File No. EW-2010-0187, at 4 (Mar. 31, 2010); Letter from Edward S. Finley, Chairman, N.C. Util. Comm'n, to Cheryl A. LaFleur, FERC Acting Chairman, FERC Docket No. RM10-17-000 (Aug. 1, 2014).

call on or not. In fact, a number of States have embraced wholesale demand response programs. For instance, Maryland authorizes its state-regulated utilities to sell aggregated demand response commitments into FERC-regulated wholesale markets and use the proceeds to help reduce electricity consumption in the State.[9] If the D.C. Circuit decision stands, it could deprive States that wish to allow or require demand response resources to participate in wholesale markets of the option of doing so.

C. States did not seek judicial review of Order 745 on jurisdictional grounds

The strongest indication that FERC has respected state authority in working to increase the efficiency of the wholesale markets by incorporating demand response programs is the paucity of state claims that Order 745 impermissibly intrudes upon their jurisdiction. In the rulemaking proceedings leading up to

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[9] Notably, in the lead-up to the promulgation of Order 745, the Governor of Maryland wrote to then-FERC Chairman Jon Wellinghoff to support FERC's proposal, and emphasized the importance of the revenues "earned by providing demand response services to [the] PJM" wholesale market. Letter from Martin O'Malley, Governor, Md., to Jon Wellinghoff, FERC Chairman, FERC Docket No. RM10-17-000 (May 12, 2010). *See* Comments of Md. Pub. Serv. Comm'n 4, FERC Docket No. ER15-852-000 (Feb. 13, 2015) (stating that PJM demand response programs help to achieve demand reduction goals, defray as much as $66.5 million of costs for Maryland EmPOWER programs, and cover twenty-eight percent of program costs).

Order 745 FERC received comments from a total of ten state electricity regulators and regional organizations of state regulators.[10] None of these state commenters challenged FERC's authority to establish a formula for compensating demand response in wholesale energy markets as interfering with state jurisdiction.

Only one state electricity regulator, the California Public Utilities Commission (CPUC), petitioned for judicial review of Order 745. It did not argue that the Order unlawfully intrudes on state jurisdiction under the Federal Power Act. Instead, it challenged a specific component of the compensation formula that FERC adopted – the provisions governing the allocation of the costs for demand response participation in the wholesale energy markets. Cal. Indep. Sys. Op. Co. & Cal. Pub. Util's Comm. C.A. Br. 1-3. CPUC has since explicitly affirmed that FERC has jurisdiction to establish a compensation formula for demand response in wholesale markets. Joint State Br. in Support of Cert. Br. 8.

Since the Court of Appeals vacated Order 745, some States have stated that they agree with its

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[10] California Public Utilities Commission, Delaware Public Service Commission, Illinois Commerce Commission, Maryland Public Service Commission, New Jersey Board of Public Utilities, New York State Public Service Commission, Public Utilities Commission of Ohio, Pennsylvania Public Utility Commission, New England Conference of Public Utilities Commissioners, and Organization of MISO States.

holding that FERC's attempt to establish a formula for compensating demand response in wholesale energy markets unlawfully intrudes upon state jurisdiction.[11] However, the significance of these belated statements is undercut by the failure of these – or any – States to make similar arguments during the proceeding that generated Order 745 or to seek judicial review on this basis after the Order was promulgated. Moreover, these States, like others, retain the ability to insulate their state level demand response programs from FERC's reach and to prohibit participation from their States in wholesale demand response programs, as discussed above.

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[11] *See* Petition for Writ of Certiorari at 34 n.9, *FERC v. Electr. Power Supply Ass'n*, No. 14-840 (Jan. 15, 2015) ("After FERC filed its rehearing petition, the Louisiana Public Service Commission filed a letter in the court of appeals in support of the challenge to FERC's authority."); Letter from Edward S. Finley, Chairman, N.C. Util. Comm'n, to Cheryl A. LaFleur, FERC Acting Chairman, FERC Docket No. RM10-17-000 (Aug. 1, 2014) ("Although not a party to this appeal [for rehearing en banc of the D.C. Circuit decision], the NCUC has previously determined . . that North Carolina retail customers cannot lawfully participate in PJM's demand response programs, reasoning in part that demand response is a retail matter left to the exclusive jurisdiction of the States.").

IV. EPSA's Attack on FERC's Jurisdiction in This Case is Flatly Inconsistent with the Position it Previously Asserted in FERC Administrative Proceedings

In a 2009 proceeding concerning the compensation formula for demand response resources in the PJM region, EPSA made jurisdictional arguments that are diametrically opposed to its present position. In that case, a group of demand response supporters opposed EPSA's proposed compensation formula on the grounds that it would intrude upon state jurisdiction over retail rates. Protest of Demand Response Supporters 12-14, FERC Docket No. EL09-68-000 (Sep. 16, 2009). In response, EPSA argued that FERC has "exclusive jurisdiction" to regulate the rules governing demand response participation in the wholesale electricity markets. Answer of Electr. Power Supply Ass'n 16, FERC Docket No. EL09-68-000 (Oct. 30, 2009). EPSA further argued that this authority "extends to reviewing the underlying components of such rules [because] [i]t is only in this way that the Commission will be able to carry out its statutory mandate to ensure the justness and reasonableness of wholesale rates." *Id.* at 15. EPSA's prior position demonstrates that its current jurisdictional argument is contrived. What EPSA opposes in this case is the compensation formula FERC has set.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals on FERC's jurisdiction.

Respectfully submitted,

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